

TRENDS TOWARDS STRONGER DATA PROTECTION: THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION

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Abstract

Access to knowledge is crucial for the flourishing of knowledge economies, the economies of the future. Information resources and data are major knowledge assets, generally and especially in the case of scholarly communications.

This paper illustrates the significance of an alternative legislative and/or soft law framework on the regulation specifically of the development and information access within the European Union.

By its dimension, ambition and complexity, the Lisbon Strategy - also known as the Lisbon Agenda or Lisbon Process - constitutes one of the most far-reaching political initiatives to have been embarked upon over the last decade. At the Lisbon European Council in 2000 the European Union set itself a new strategic goal for 2010, a goal which consisted of a global and long-term agenda of reform and modernisation.

The subject matter of this paper is grounded on the key question of the appropriate equilibrium between copyright law and data protection in relation to informational resources, among European institutions, according to European regulations and recommendations

Taking everything into account, it is undeniable fact that current European legislation and its framework concerning data protection should be shifted. In particular, such a framework might in its turn help however little towards securing the widest possible protection of human rights for European people.

Keywords: Data protection, right to be forgotten, legislative framework, European regulations, human rights

Introduction

Background of European data protection law

Under the Article 8 of the European Convention of Human Rights (ECHR), a right to protection against the collection and use of personal data

forms part of the right to respect for private and family life, home and correspondence.

A right to protection of an individual's private sphere against intrusion from others, in particular from the state, was laid down in an international legal instrument for the first time in Article 12 on the United Nations Universal Declaration of Human Rights (UDHR) of 1948 on respect for private and family life. The UDHR influenced the development of other human rights tools in Europe (United Nations, 1948).

The right to protection of personal data forms part of the rights protected under Article 8 of the ECHR, which guarantees the right to respect for private and family life, home and correspondence and lays down the conditions under which restrictions of this are permitted (Council of Europe, 1950).

With the 'revolution' of information technology in the 1960s, a burgeoning need developed for more detailed regulations to safeguard individuals by protection their (personal data). By the mid-1970s, the Committee of Ministers of the Council of Europe adopted assorted resolutions on the protection of personal data, referring to the abovementioned Article 8 of the ECHR. In 1981, a Convention for the protection of individuals concerning the automatic processing of personal data (Convention 108) was opened for signature.

Taking everything into consideration, convention 108 was, and still continues to be the only legally binding international instrument in the data protection field (Council of Europe, 1981).

Personal data: scientific approach

Personal data is any information relating to an individual, whether it relates to his or her private, professional or public life. It can be anything from a name, a photo, an email address, bank details, your posts on social networking websites, your medical information, or your computer's IP address. The EU Charter of Fundamental Rights says that everyone has the right to personal data protection in all aspects of life: at home, at work, whilst shopping, when receiving medical treatment, at a police station or on the Internet.

In the digital age, the collection and storage of personal information are essential. Data is used by all businesses – from insurance firms and banks to social media sites and search engines. In a globalized world, the transfer of data to third countries has become an important factor in daily life. There are no borders online and cloud computing means data may be sent from Berlin to be processed in Boston and stored in Bangalore.

On 4 November 2010, the Commission set out a strategy to strengthen EU data protection rules (IP/10/1462 and MEMO/10/542). The

goals were to protect individuals' data in all policy areas, including law enforcement, while reducing red tape for business and guaranteeing the free circulation of data within the EU. The Commission invited reactions to its ideas and also carried out a separate public consultation to revise the EU's 1995 Data Protection Directive (95/46/EC).

Data protection rules in European Union aim to protect the fundamental rights and freedoms of natural persons, and in particular the right to data protection, as well as the free flow of data. This general Data Protection Directive has been complemented by other legal instruments, such as the e-Privacy Directive for the communications sector. There are also specific rules for the protection of personal data in police and judicial cooperation in criminal matters (Framework Decision 2008/977/JHA).

The right to the protection of personal data is explicitly recognised by Article 8 of the EU's Charter of Fundamental Rights and by the Lisbon Treaty (Official Journal, 2000). The Treaty provides a legal basis for rules on data protection for all activities within the scope of EU law under Article 16 of the Treaty on the Functioning of the European Union (Official Journal, 2007).

Current legislation framework of online data in Europe

Nowadays, Internet continues to grow, driven by ever greater amounts of online information, commerce, entertainment, and social networking. Therefore, it is realised that European Union's fundamental goal, which was mentioned above concerning 'knowledge society', should be also based to digital reality, in other words digital economy.

Following excessive press by online companies from Europe and the US, the European Commission has lessened its attitude regarding the 'right to be forgotten' as an anticipation of a rebuild/ reconstruction of data privacy regulations/ rules due early of 2012.

On the 25th of January 2012, Viviane Reding, Vice-President of the EC in charge of Justice, Fundamental Rights and Citizenship, gave a press conference with regard to the EC proposal of a comprehensive reform of data protection rules to grow users' administration/ control of their data and to cut/ decrease/ diminish costs for businesses.

Moreover, the EC has proposed a comprehensive reform of the EU's 1995 data protection rules to strengthen online privacy rights and boost Europe's digital economy. Technological evolution and globalisation had profoundly changed the way information was collected, accessed and used. Additionally, the 27 EU Member States had implemented the 1995 rules differently, resulting in divergences in enforcement. The initiative would help reinforce consumer confidence in online services, providing a much needed boost to development, jobs and innovation in Europe.

Key changes in the reform include:

i. A single set of rules on data protection, valid across the EU. Unnecessary administrative requirements, such as notification requirements for companies, will be removed. This will save businesses around €2.3 billion a year.

ii. Instead of the current obligation of all companies to notify all data protection activities to data protection supervisors – a requirement that has led to unnecessary paperwork and costs businesses €130 million per year, the Regulation provides for increased responsibility and accountability for those processing personal data.

iii. For example, companies and organisations must notify the national supervisory authority of serious data breaches as soon as possible.

iv. Organisations will only have to deal with a single national data protection authority in the EU country where they have their main establishment. Likewise, people can refer to the data protection authority in their country, even when their data is processed by a company based outside the EU. Wherever consent is required for data to be processed, it is clarified that it has to be given explicitly, rather than assumed.

v. People will have easier access to their own data and be able to transfer personal data from one service provider to another more easily (right to data portability). This will improve competition among services.

vi. A ‘right to be forgotten’ will help people better manage data protection risks online: people will be able to delete their data if there are no legitimate grounds for retaining it.

vii. EU rules must apply if personal data is handled abroad by companies that are active in the EU market and offer their services to EU citizens.

viii. Independent national data protection authorities will be strengthened so they can better enforce the EU rules at home. They will be empowered to fine companies that violate EU data protection rules. This can lead to penalties of up to €1 million or up to 2% of the global annual turnover of a company.

ix. A new Directive will apply general data protection principles and rules for police and judicial cooperation in criminal matters. The rules will apply to both domestic and cross-border transfers of data (European Commission, 2012).

During an event organised by the American Chamber of Commerce in Brussels V. Reding also claimed that: *‘We need a framework for privacy that protects consumers and encourages the digital economy to grow’*.

Similarly in March 2012, when she delivered a barnstorming speech in the European Parliament, she also declared/ said that: *‘The right to be forgotten should build on existing rules. If one doesn’t want his data to be*

stored any longer and there is no legitimate need for the company to keep it, then data should be removed'. Additional, she mentioned that the new law is 'drastically' decrease bureaucracy and establish a 'more business-friendly environment'. Companies such as Google and Facebook will no longer be required to send general notifications to data protection authorities in each member state, but instead will focus on those requirements which enhance legal certainty.

European legislation on data protection

It goes without saying that consideration in association with data protection can be observed within European enterprises such as communications, regulations, directives etc. Particularly, the basic pillar of the existing European legislation with regard to personal data protection, Directive 95/ 46/ EC, was adopted in 1995 with two objectives: to protect the fundamental right to data protection and to secure the free flow of personal data between Member States (Official Journal, 2001).

New challenges have been brought via technological developments concerning protection of personal data. The ration of gathering and sharing data/ information has increased dramatically. Technology allows both private companies and public authorities to make use of personal data on an extraordinary range in order to conduct their activities. Thus, individuals make personal information available publicly, globally and aspects of economic and social life have been changed.

Considerations and controversies

It should be mentioned that until 2011, the right to be forgotten used to be Viktor Mayer's idea, an Austrian Law Professor, showing that it is of paramount importance and should be further discussed regarding effective issues/ solutions. Specifically, he argued that providing a 'best before data' for data that is electronically saved. After date expiration, the data would be automatically deleted by the application of computer system/ server which hosts/ holds information.

According to Mayer "...if you can be deleted from Google's database, i.e. if you carry out a search on yourself and it no longer shows up, it might be in Google's back-up, but if 99% of the population don't have access to it you have effectively been deleted" (Connolly, 2013).

Since the EU Commission's proposal was first publicly available, the right to be forgotten has been widely discussed and attacked. There are advocates argued that it is impossible to technically meet the requirements set forth by the regulation. Some other proponents call the request for complete erasure censorship. Despite this, there were few supporters who state that the right to be forgotten something that should become legally

binding in all European Member States.

However, another one trend that should be also observed is that Britain is attempting to withdraw the aforementioned European initiative which enables anyone to delete their personal details from online service providers. The United Kingdom's principal basic objection to 'the right to be forgotten' is that improbable anticipations will be produced by the right's far-reaching title as the jurisdictions/ restraints suggested will be rather prudent in their conflict on the way data transmits, or is exchanged, among websites.

Conclusion

Due to F. Werro there is '...a fairly dramatic transatlantic schism in the law of privacy'. Therefore, a divide in relation to personal data protection has been 'produced' between those who trust in the government and distrust the market and proponents who take precisely the opposite view.

Nevertheless, Viviane Reding⁴⁷ declares that '...data protection is made in Europe. Strong data protection rules must be Europe's trade mark'. Moreover, this depicts long-term perspectives that should be offered to its framework among European Union members that should be based on open coordination method which stems from Lisbon Strategy

The subject matter of data protection and its relation with intellectual property can be seen as crucial towards European Integration. Yet, a uniform system of protection of intellectual property rights, ranging from industrial property to copyright and related rights, constitutes the foundation for creativeness and innovation within the European Union. In addition, protection of intellectual property is covered by many international conventions, the majority of which are implemented by World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO).

To sum up and with regard to data protection the right to be forgotten can be used as a mean to assist and protect, simultaneously, individuals who are interested in secure personal data. It can be seen as the effective way to bridge aforementioned divide. Therefore, European Commission's current regulation with regard to the processing of personal data and on the free movement of such data pursues to present, where feasible, further legislative and non-legislative initiatives.

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